11-21-2016

State v. Aberasturi Appellant's Brief Dckt. 44247

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44247**
Plaintiff-Appellant,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2015-14541**
	)	
GABBRIELLE RAMONA ABERASTURI AKA POWELL,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RICHARD D. GREENWOOD
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR PLAINTIFF-APPELLANT

ERIC D. FREDERICKSEN
Interim State Appellate Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR DEFENDANT-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

The state appeals from the district court's order granting Gabbrielle Aberasturi's motion to suppress evidence.

Statement Of The Facts And Course Of The Proceedings

At approximately 2:20 a.m. Officer Viens noticed a suspicious person in an alleyway dumpster. (Tr., p. 30, L. 14 – p. 31, L. 6; p. 32, Ls. 16-23; p. 33, L. 10 – p. 34, L. 7.) Officer Viens made contact with that person, later identified as Aberasturi, who was "dumpster diving" for discarded items to resell. (Tr., p. 11, Ls. 4-17; p. 34, L. 25 – p. 35, L. 8.) The alley was familiar to Viens because it was "a known place to officers that work that shift for criminal activity." (Tr., p. 36, L. 9-16.) Officer Viens also made contact with an acquaintance of Aberasturi who was sitting inside her car nearby. (Tr., p. 30, Ls. 21-24; p. 32, Ls. 6-13.)

Officer Viens told Aberasturi to get out of the dumpster and informed her she was being detained for disorderly conduct. (Tr., p. 31, L. 12 – p. 32, L. 13; p. 36, Ls. 17-22; p. 37, Ls. 5-8.) Aberasturi was cooperative, and not placed under arrest, but was not free to leave. (Tr., p. 37, Ls. 9-13; p. 48, Ls. 13-15.)

In less than two minutes Officer Hoffman responded to the scene. (Tr., p. 35, L. 25 – p. 36, L. 4.) Officer Viens verbally identified Aberasturi, asked her to "sit tight for a second," and returned to his patrol car to run both suspects' information through dispatch. (Tr., p. 35, Ls. 4-8; p. 37, L. 17 – p. 38, L. 1; p. 48, Ls. 2-9; Defense Ex. 1, 01:51.) While Officer Viens ran their information,

confirming identifies and checking for warrants, Officer Hoffman kept an eye on the suspects. (Tr., p. 31, Ls. 7-11; p. 38, Ls. 8-23; p. 39, L. 19 – p. 40, L. 9.)

Approximately four minutes after initial contact was made, Officer Plaisted was the third officer to arrive on scene. (Tr., p. 38, L. 24 – p. 39, L. 11.) Officer Viens was still sitting in his car running the suspects' information. (Tr., p. 39, L. 3 – p. 40, L. 9; p. 52, Ls. 4-11.) While Officer Viens did that, Officer Plaisted made contact with Aberasturi. (Tr., p. 40, Ls. 10-15; p. 67, L. 13 – 68, L. 1.) Officer Plaisted testified that he "briefly spoke" to Aberasturi, and that after he asked if he "could have consent to search her car," that "[s]he said I could." (Tr., p. 68, L. 15 – p. 69, L. 5.) Officer Viens affirmed that "sometime between me running [the suspects] through dispatch and then me going back and speaking [to] them," that he overheard the conversation between Aberasturi and Officer Plaisted. (Tr., p. 41, L. 9 – p. 42, L. 12.) Officer Viens testified that "I heard [Aberasturi] give him consent to search her vehicle."[1] (Tr., p. 41, Ls. 13-14.)

After Aberasturi consented to the search of her vehicle, Officer Plaisted ran his K-9 around her vehicle. (Tr., p. 69, L. 12 – p. 71, L. 4.) The K-9 alerted on the vehicle. (Tr., p. 71, Ls. 5-24.) Prior to that alert, Officer Viens had returned to speak with Aberasturi regarding the dumpster diving. (Tr., p. 42, L.

[1] Aberasturi disputed below that she consented to the search of her vehicle. (Tr., p. 10, L. 21 – p. 11, L. 3.) However, the court concluded that while the consent was not captured on audio, it found the officers' testimony about the consent was credible. (R., p. 125.) This conclusion is supported by substantial evidence in the record. (See Tr., p. 40, Ls. 13-18; p. 41, Ls. 9-24; p. 48, L. 23 - p. 49, L. 4; p. 69, Ls. 6-15; p. 79, Ls. 13-17; p. 80, Ls. 8-11.)

21 – p. 43, L. 17; p. 56, Ls. 21-24.) Before Officer Viens concluded his warning to Aberasturi, Officer Plaisted notified him that the K-9 had alerted. (Tr., p. 43, Ls. 18-25; p. 71, L. 22 – p. 73, L. 18.) For the second time that night, Officer Viens told Aberasturi to "sit tight" and proceeded to search the vehicle with Officer Plaisted. (Tr., p. 74, Ls. 17-22; Defense Ex. 1, 11:36.) The officers found methamphetamine inside it. (Tr., p. 44, Ls. 5-18.)

Aberasturi moved to suppress the evidence found inside the vehicle. (R., pp. 63-65, 77-86, 94-102.) The district court granted her motion, concluding that the detention of Aberasturi was unreasonably extended. (R., pp. 121-132.)

The state timely appealed. (R., pp. 135-38.)

ISSUE

Did the district court err by concluding that Aberasturi's detention was unreasonably extended?

ARGUMENT

The District Court Erred By Concluding That Aberasturi's Detention Unreasonably Extended The Investigation

A. Introduction

Aberasturi moved the district court for an order suppressing the evidence found in her vehicle. The court granted that motion, finding that it was unclear whether the K-9 alerted on Aberasturi's car prior to the end of the warning conversation for disorderly conduct. (R., pp. 129-30.) This was significant to the court because "[i]f [K-9] Geno had sat and refused to move **after** Officer Viens concluded his conversation with Defendant, there was no probable cause for the search before the detention became unreasonable." (R., p. 130 (emphasis added).) The court concluded that the state "failed to meet its burden of proof that probable cause to search Defendant's automobile was developed before the purpose of the investigative stop had been fulfilled"—that is, before the warning conversation between Aberasturi and Officer Viens was concluded with his second instruction to "sit tight." (See R., p. 130.) The district court therefore found that Aberasturi's detention had been unreasonably extended, and suppressed the evidence found in her vehicle. (R., pp. 128-31.)

However, application of the legal standards to the facts shows this evidence should not have been suppressed. When Aberasturi was instructed to "sit tight" a second time the K-9 had already alerted on her vehicle; thus, any prolonged detention would have been lawful. Additionally, the district court erred by requiring probable cause, as opposed to reasonable suspicion, to justify

extending the stop. Application of the correct legal standard to the facts found shows reasonable suspicion of drug-related criminal activity.

B. Standard Of Review

This Court reviews suppression motion orders with a bifurcated standard. State v. Wulff, 157 Idaho 416, 418, 337 P.3d 575, 577 (2014). When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are not clearly erroneous, but freely reviews the application of constitutional principles to those facts. Id.

C. The District Court Clearly Erred By Determining That Aberasturi's Detention Was Prolonged Beyond The Original Investigation, Because Before Aberasturi Was Told To "Sit Tight" A Second Time, Officer Viens Had Already Been Notified That The K-9 Had Alerted On Aberasturi's Vehicle

Pursuant to the Fourth Amendment of the United States Constitution "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. A police officer may detain a person for the purposes of investigating possible criminal behavior "if there is an articulable suspicion that the person has committed or is about to commit a crime." State v. Wright, 134 Idaho 73, 76, 996 P.2d 292, 295 (2000) (quoting State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992)). Such a detention "is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." State v. Sheldon, 139 Idaho 980,

983, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Cortez, 449 U.S. 411, 417 (1981)).

An investigative detention must not only be justified at its inception, but must also be carried out in a manner that is reasonably related in scope and duration to the circumstances which justified the interference in the first place. State v. Roe, 140 Idaho 176, 181, 90 P.3d 926, 931 (Ct. App. 2004). "The purpose of a stop is not permanently fixed, however, at the moment the stop is initiated, for during the course of the detention there may evolve suspicion of criminality different from that which initially prompted the stop." Sheldon, 139 Idaho at 984, 88 P.3d at 1224.

Law enforcement may deploy a drug dog to sniff the exterior of a lawfully stopped vehicle without suspicion of drug activity so long as doing so does not prolong the detention beyond what is necessary to effectuate the purpose of the stop. Illinois v. Caballes, 543 U.S. 405, 409-10 (2005); State v. Wigginton, 142 Idaho 180, 183-84, 125 P.3d 536, 539-40 (Ct. App. 2005). "When a reliable drug-detection dog indicates that a lawfully stopped automobile contains the odor of controlled substances, the officer has probable cause to believe that there are drugs in the automobile and may search it without a warrant." State v. Yeoumans, 144 Idaho 871, 873, 172 P.3d 1146, 1148 (Ct. App. 2007) (quoting State v. Gibson, 141 Idaho 277, 281, 108 P.3d 424, 428 (Ct. App. 2005)). "If probable cause justifies the search of a vehicle, then it justifies the search of every part of the vehicle and its contents which could conceal the object of the

search." State v. Braendle, 134 Idaho 173, 175, 997 P.2d 634, 636 (Ct. App. 2000).

Ruling on Aberasturi's motion, the district court found the following facts: Officer Viens appeared on the scene at approximately 2:20 am.[2] (R., p. 125; Tr., p. 34, Ls. 19-24.) The alleyway was in a known high-crime area, and Officer Viens suspected a violation of Boise City Code § 6-01-05(B), Disorderly Conduct.[3] (R., pp. 125-26; Tr., p. 31, L. 12 – p. 32, L. 1; p. 36, Ls. 9-16.) Officer

[2] The district court calculated relevant timelines by relying on the officers' testimony, the CAD dispatch printout admitted into evidence as State's Exhibit 10, and Officer Hoffman's audio of the incident admitted into evidence as Defense Exhibit 1. (See R., p. 124.) The district court explained its methodology and conclusions:

> Officer Hoffman was the second to arrive on the scene. His audio recording is time stamped as to duration. That is, the recording shows the passage of time in seconds as the recording plays. Based upon the elapsed time from the commencement of the recording and the point at which the conversation between Officer Viens and the Defendant become[s] audible, the Court finds that Officer Hoffman commenced his audio recording upon exiting his patrol vehicle. By comparing known events on Officer Hoffman's recording with events reflected in the Incident History, the Court is able to reconstruct a chronology of events. The time stamp on the Incident History is given in seconds so the Court's chronology is also given in seconds. The actual time of events may be off by a few seconds depending on the exact time that Officer Hoffman commenced his recording, but the relative lapse of time is accurate.

(R., p. 124.)

[3] The district court cited to Section 6-01-05 of the Boise City Code, Disorderly Conduct:

> Any person who violates the provisions below is guilty of a misdemeanor:

Viens told Aberasturi to "sit tight for a second" at 2:23:40, at which point he went to his patrol car to run her information through dispatch. (R., p. 126; Tr., p. 37, L. 17 – p. 38, L. 7; Defense Ex. 1, 01:51.) Officer Plaisted arrived on scene with his K-9 at 2:24:44 (R., pp. 126-27; Tr., p. 38, L. 24 – p. 39, L. 18; p. 66, Ls. 17-23), and spoke with Aberasturi at 2:28:34. (R., p. 127; Tr., p. 66, L. 17 – p. 68, L. 17; Defense Ex. 1, 06:37.) Both officers testified that Aberasturi consented to a search of her vehicle.[4] (R., p. 127; Tr., p. 40, Ls. 10-18; p. 41, Ls. 9-24; p. 48, L.

> A. Occupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without the permission of the owner or person entitled to possession or in control thereof; or
> B. Loitering, prowling or wandering upon the private property of another, without lawful business, permission or invitation by the owner or the lawful occupants thereof; or
> C. Loitering or remaining in or about school grounds or buildings, without having any reason or relationship involving custody of or responsibility for a pupil or student, school authorized functions, activities or use.
> D. Law enforcement officers shall not enforce subsection A above (disorderly conduct ordinance), when the individual is on public property and there is no available overnight shelter. The term "available overnight shelter" is a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge. If the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available.
>
> (Available at http://cityclerk.cityofboise.org/media/223588/0601.pdf.)

(R., p. 126.)

[4] It is clear that Aberasturi's consent would have justified the search of her vehicle. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted); State v. Hansen, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). However, that does not resolve the relevant question on appeal—whether a *detention* of Aberasturi with a second instruction to "sit tight" would also be justified.

23 – 49, L.1; p. 68, L. 18 – p. 69, L.5.) By approximately 2:30:15, Officer Viens had concluded running Aberasturi's information, and can be heard having a discussion with Aberasturi regarding disorderly conduct, warning her that it would be prudent to obtain written permission from storeowners before dumpster diving again. (R., pp. 127-28; Tr., p. 43, Ls. 7-17; Defense Ex. 1, 08:16-11:36.) The district court found that at some point Officer Plaisted had retrieved his K-9 "Geno" to conduct an exterior sniff of Aberasturi's vehicle. (R., p. 128; Tr., pp. 69-71.) Lastly, the court found that the warning conversation between Aberasturi and Officer Viens concluded at around 2:33:55. (R., pp. 127-128; Defense Ex. 1, 11:36.) The incident audio reveals that the conversation ended with another instruction from Officer Viens to "sit tight." (Defense Ex. 1, 11:36.)

The issue on appeal, as phrased by the district court, is that "[i]f Geno had sat and refused to move after Officer Viens concluded his conversation with Defendant, there was no probable cause for the search before the detention became unreasonable." (R., p. 130.) The court found that because "the exact time [that Geno alerted] cannot be determined," the state had failed to prove the detention was lawfully extended. (R., pp. 129-31.)

However, the district court clearly erred when it concluded the state failed to prove whether the K-9 alert happened before the end of the conversation between Aberasturi and Officer Viens. (See R., pp. 129-30.) First, as to the timing of the K-9 alert and subsequent notification, the record reveals that the K-9 alert occurred *before* Officer Viens ever concluded his original investigation. Officer Viens testified as follows:

Q. Okay. And **while you're having this discussion with her about the disorderly conduct violation, does Officer Plaisted get your attention.**

A. **Yes**.

Q. And what is that for?

A. **To let me know that his dog alerted on the vehicle.**

(Tr., p. 43, Ls. 18-25 (emphasis added).) The district court affirmed that this officer-to-officer notification happened before the conversation between Officer Viens and Aberasturi concluded—it found that "[t]he Court realizes that Officer Viens testified that he became aware **during his conversation with Defendant**, that Officer Plaisted signaled that something was going on with the dog and the vehicle." (R., p. 130 (emphasis added).)

The only remaining question is what the officer-to-officer notification signified. The district court concluded the notification related to the K-9's activities, but also found "[w]hether [the notification from Officer Plaisted] occurred as Geno was showing interest in the window or after he sat and refused to move is unknown." (R., p. 130.) In other words, the court felt it could not determine whether the K-9 alert came before the notification, and therefore, came before the instruction that Aberasturi "sit tight." However, Officer Viens' and Officer Plaisted's testimony make it plain that the notification came after the dog *alerted*. First, as set forth above, Officer Viens testified the notification was "[t]o let me know that his dog alerted on the vehicle." (Tr., p. 43, Ls. 24-25.) Second, Officer Plaisted testified:

A. So he's—he's sat down. He's alerted to the car. I now have probable cause to search this car.

I open up the passenger door. He immediately flies into the car, goes right to the center console area of the vehicle, again starts sniffing around the center console….

Q. Okay. And so after he does that, what do you do next?

A. I pull him out of the car, I lifted up the center console, looked in, and saw a package of Marlboro cigarettes. And I opened that up, looked in, and I believe I saw a plastic baggie with some white powder in it which I believed to be methamphetamine at that point. **I, then, left the car, shut the door to go put my dog back in the car, in my patrol car, and notified Officer Viens of the alert and specific areas that we needed to search.**

(Tr., p. 71, L. 22 – p. 73, L. 1 (emphasis added).)

Q. So when your dog alerted and you let him inside the car—

A. Right.

Q. —and he showed interest in the center console and so then you searched and found that, did you at this time search the entirety of the car?

A. No, ma'am.

Q. **Okay. That's when you closed the door, put the dog back, and then alerted Officer Viens?**

A. **Yes, ma'am**.

(Tr., p. 73, Ls. 8-18 (emphasis added).) This evidence shows that the notification followed the alert, and pertained to the alert. Moreover, the testimony shows that the K-9 gave its alert establishing probable cause—and Officer Plaisted notified Officer Viens of the same—*before* Officer Viens concluded his original investigation with a warning. Thus, the evidence clearly establishes that by the time Officer Viens issued his second "sit tight" instruction

to Aberasturi, the K-9 alert—and the discovery of suspected methamphetamine—had already occurred.[5]

Applying the law to these facts shows the detention was lawful from beginning to end: Officer Viens arrived on the scene at approximately 2:20 a.m., made contact with Aberasturi, and in four to five minutes was returning to his car to run her information through dispatch to check for warrants. (Tr., p. 37, Ls. 1-4; p. 39, Ls. 4-11.) This initial detention, for suspicion of violating the Boise city code, was lawful. Sheldon, 139 Idaho at 983, 88 P.3d at 1223. (See R., p. 128.) Running Aberasturi's information through dispatch was likewise a reasonable extension of this investigation. See Roe, 140 Idaho at 181–82, 90 P.3d at 931–32; see also Rodriguez v. United States, 135 S. Ct. 1609, 1614–15 (2015). Less than three minutes later Officer Viens finished running her information. (Tr., p. 42, Ls. 13-16; State's Ex. 10.) He returned to speak with Aberasturi, and instead of issuing her a citation, he began giving her a verbal warning that cautioned her to obtain written permission before she went dumpster diving again. (Tr., p. 43, Ls. 7-17.)

Based on the incident audio the dumpster diving discussion was taking place at around 2:30:35, which means that in less than eleven minutes Officer

[5] The incident audio reflects that this account is correct: one can hear Officer Viens' discussion with Aberasturi beginning somewhere after 8:16, becoming more audible around 8:38, and persisting until 11:36. (Defense Ex. 1.) To the extent it can be heard, the conversation never strays from or prolongs beyond the topic of the initial detention—Aberasturi's disorderly conduct—and Officer Viens ends his warnings regarding future dumpster diving with an abrupt instruction to "sit tight." (Defense Ex. 1, 08:16-11:36.) Based on the officers' testimony this would have been the point at which the officers searched the vehicle. (See Tr., p. 74, Ls. 17-22.)

Viens was wrapping up the investigation with his warning. (See Defense Exhibit 1, 8:38; see also State's Ex. 10 (showing Officer Viens arriving at approximately one minute and twenty-eight seconds before the incident audio began, thus placing the warning discussion at approximately 2:30:35).) Before this conversation concluded, Officer Plaisted notified Officer Viens that his K-9 alerted on Aberasturi's vehicle. (Tr., p. 43, Ls. 18-25; p. 72, L. 15 – p. 73, L.1; p. 73, Ls. 8-18.) This alert established not only reasonable suspicion for the continued detention of Aberasturi—now a suspect in a narcotics investigation—but probable cause to search her vehicle. See Sheldon, 139 Idaho at 984, 88 P.3d at 1224; see also Yeoumans, 144 Idaho at 873, 172 P.3d at 1148. Thus, the second instruction to "sit tight" was now a wholly reasonable detention in a lawfully expanded investigation.

The district court was mistaken in finding that "the exact time [of the K-9 alert] cannot be determined," and mistaken in finding the state did not prove the K-9 alert occurred before the original investigation was over. (R., p. 129-30.) Here, the facts in the record show that the K-9 alerted, and Officer Plaisted notified Officer Viens of the alert, before that initial investigation ever concluded. The district court's suppression of the evidence found in the vehicle was therefore incorrectly premised on a clearly erroneous reading of the facts.

D. The District Court Erred By Determining That There Was Insufficient Probable Cause To Detain Aberasturi; The State Only Needed Reasonable Suspicion To Further Detain Aberasturi, Which Was Established By The K-9 Showing Interest In Aberasturi's Vehicle

Alternatively, even if the district court correctly determined that the timing of the K-9 alert or significance of the officer-to-officer notification is unclear, it still erred by applying the probable cause rather than the reasonable suspicion standard to the extended detention. Even if Officer Plaisted's notification signified only that his K-9 was "showing interest" in the vehicle as stated by the district court, this would have still provided reasonable suspicion justifying an extended detention of Aberasturi.

Here, Officer Plaisted's K-9 was trained to detect the odors of illegal narcotics. (Tr., p. 64, Ls. 15-19.) Aberasturi made no objection to the training of the officer or the K-9. (See Tr., p. 62, L. 6 – p. 65, L. 18.) Officer Plaisted testified that he walked his K-9 around Aberasturi's vehicle:

> So, again, I'm just taking Geno for just a casual walk, is what it is. It wasn't until we got to the passenger's side of this vehicle that that casual walk turned into something more.
>
> I saw Geno do a head snap which is—you know, typically his head is kind of down facing forward. And all of a sudden it snaps to the left, which draws my attention. And now he's beginning to sniff the odors that are coming out of this car. Geno starts doing what's called a bracketing behavior, which he's sniffing both left to right.
>
> He approaches I believe it was the front passenger door. I saw that the window on the passenger door was rolled down slightly. Geno lifts his head up in the air, places his front paws on the door of the windowsill itself, and he attempted to stretch his body to get his nose closer to the gap in the window to sniff. And then after he did that, he took his paws off the door and then sat down.

(Tr., p. 70, L. 8 – p. 71, L. 4.)

The district court stated multiple times that Aberasturi's continued detention was not justified by probable cause. It explained that "[i]f Geno had sat and refused to move after Officer Viens concluded his conversation with Defendant, there was no **probable cause** for the search before the detention became unreasonable." (R., p. 130 (emphasis added).) The court went on: "[b]ecause the State failed to meet its burden of proof that **probable cause** to search the Defendant's automobile was developed before the purpose of the investigative stop had been fulfilled, the Court determines the search was unreasonable." (R., p. 130 (emphasis added).)

The district court erred as a matter of law by concluding the officers needed probable cause to detain Aberasturi. The officers only needed reasonable suspicion of a different criminal activity to detain Aberasturi beyond the conclusion of the original investigation. See, e.g., Sheldon, 139 Idaho at 984, 88 P.3d at 1224.

Application of the correct legal standard to the facts found by the district court shows reasonable suspicion of drug activities justified continuing the detention. The district court stated that "[w]hether the [officer-to-officer notification] occurred as Geno was showing interest in the window or after he sat and refused to move is unknown." (R., p. 130.) Even if one assumes the notification from Officer Plaisted signified that the K-9 was only "showing interest" in the window, this still means that Officer Viens was notified that a drug-detecting K-9, handled by a state-certified K-9 handler, was snapping his head, sniffing odors, exhibiting bracketing behavior, and "plac[ing] his front paws on

the door" of Aberasturi's car in an attempt to get his nose close to the window gap to sniff. (Tr., p. 63, L. 15 – p. 64, L. 19; p. 70, L. 8 – p. 71, L. 4.) Even if insufficient to show probable cause, the drug-detecting K-9's increasing interest in Aberasturi's vehicle still provided reasonable suspicion of drug activity. Thus, even granting the district court's finding that perhaps Officer Plaisted's notification did not pertain to the alert, but merely referred to the bracketing behavior preceding the alert, Officer Viens would have nevertheless had reasonable suspicion to prolong Aberasturi's detention.[6]

The district court incorrectly concluded that a lack of probable cause, as opposed to reasonable suspicion, invalidated Aberasturi's detention. Under the correct standard, even adopting the district court's factual findings, there was reasonable suspicion for a prolonged detention. The court accordingly erred in suppressing the evidence that was ultimately found.

CONCLUSION

The state respectfully requests that this Court reverse the district court's order granting Aberasturi's suppression motion and remand this case for further proceedings.

DATED this 21st day of November, 2016.

_/s/ Kale D. Gans_____
KALE D. GANS
Deputy Attorney General

[6] Following the detention, the subsequent search itself would have plainly been justified by Aberasturi's consent, or the K-9 alert establishing probable cause. See, e.g., Schneckloth, 412 U.S. at 219; see also Yeoumans, 144 Idaho at 873, 172 P.3d at 1148.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of November, 2016, served a true and correct copy of the foregoing BRIEF OF APPELLANT by emailing an electronic copy to:

ERIC D. FREDERICKSEN
INTERIM STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd